Disclosure of Sexual Harassment Investigative Materials

In a recent case in which our firm participated as counsel for the employer, the New Jersey Supreme Court recognized for the first time a conditional privilege of confidentiality for materials assembled or prepared by an employer during an investigation of a sexual harassment complaint, Payton v. New Jersey Turnpike Authority, et al..

The Court held that, under appropriate circumstances, steps should be taken to protect this confidentiality, which may include allowing an employer to withhold (or redact) investigative materials from discovery. In general, however, the Court held that materials generated during a sexual harassment investigation are discoverable by an employee in a suit against the employer.

As a result of the Court's decision, employers are placed in the difficult position of conducting sensitive investigations which will probably have to be disclosed at some future point not only to the complainant but also to the alleged harasser unless there are specific reasons to maintain confidentiality. While the Payton Court used broad language in its opinion, automatic disclosure will not likely be the rule. We also believe that as trial courts grapple with the issues posed by specific cases, the difficulty in balancing the competing interests will become more clear. In any event, the Payton decision requires that employers proceed carefully in responding to allegations of sexual harassment (or any form of discrimination).

THE COURT'S DECISION

In Payton, the plaintiff alleged that the NJTA was vicariously liable for the harassment by two of the plaintiff's supervisors under the New Jersey Law Against Discrimination ("NJLAD"). Shortly after the complaint was filed, the NJTA concluded its investigation and disciplined the two supervisors. It also asserted as an affirmative defense its remedial action. In essence, the NJTA argued that because it had investigated the allegations and then disciplined the supervisors, it neither participated in nor acquiesced in the harassment. As a result, it should not be vicariously liable.
When the plaintiff requested discovery of the report, witness statements, etc., the NJTA declined, asserting that various privileges protected the investigative materials from disclosure.

The Supreme Court, however, in a lengthy opinion, rejected the proposition that possibly applicable privileges - attorney/client, work product, and self-critical analysis - would automatically shield the investigative materials. Instead, the Court expressed generally the view that investigative materials were discoverable. But, it acknowledged that allegations of sexual harassment raised legitimate privacy concerns and discovery issues would have to be decided on a case by case basis to guard against unjustified invasions of privacy.

The Court identified a number of factors to be considered. Most clearly, the Court ruled that if employers assert the effective remedial action defense (i.e., it relies upon the investigation and remedial action to avoid liability), the investigative materials will be discoverable. The Court also recognized that the purpose of the investigation and the need for confidentiality in a specific case will be critical. Unfortunately, the Court did not identify a bright line test to guide companies which want to preserve confidentiality.

The Payton Court held that if the investigation is done in anticipation of litigation, then the investigative materials may be protected from disclosure by the attorney/client or work/product privileges, if those privileges would otherwise apply. In contrast, if an employer is conducting an investigation as a purely remedial action for the purpose of complying with its obligations as an employer, then such privileges would apparently not apply. The Court's opinion did not expressly address, however, the situation where an employer's investigation is for both remedial and litigation purposes.

The Payton Court also exhibited in its opinion (as well as during oral argument) a rather skeptical attitude towards assertions of privilege. It is not clear, however, whether this skepticism is limited to sexual harassment investigations or reflects a broader change in attitude. In particular, the Court explicitly rejected the self-critical analysis privilege, whereby an employer seeks to prevent disclosure of materials on the grounds that the investigation was undertaken to discover the reasons for past problems in order to prevent the problems from recurring. The Court also seemed to reject the notion that attorneys conducting an internal investigation on behalf of clients were necessarily acting in their role as attorney and that their communications and tasks were generally privileged; instead, the Court suggested that each task performed would have to be considered separately to determine whether the services were those of an attorney for which a privilege may apply. If this is a correct reading of Payton, it would be inconsistent with the approach taken by the United States Supreme Court in Upjohn Co. v. United States, 449 U.S. 383 (1981) and have significant implications outside harassment investigations.

RECOMMENDED ACTIONS
The Payton decision emphasizes the need to conduct careful, intelligent sexual harassment investigations and to prepare reports in a similar fashion. Because the Supreme Court's language is broad, there is still ambiguity as to how far the courts will go in requiring disclosure.

Because of the conflicting considerations present in sexual harassment investigations, it is necessary for an employer to do what it can to preserve a claim of privilege. For example, an employer might want to provide written instructions to investigators that will increase the likelihood of preserving the claims of attorney/client and work/product privileges. The preparation of two reports -- one factual in content and the other containing the conclusions, impressions and opinions of the investigator(s) -- may also be wise as a court may recognize that the more factual report must be produced but the second report is privileged.

The investigators, especially if they are not attorneys, must be trained on how to prepare the reports and understand that their work product, including notes, may be discoverable. The reports themselves should also be simplified and stripped to their essentials. The adage that people get into trouble by saying too much more often than by saying too little applies here. An employer may want to be more conclusive in its report than in the past and seek only to make it clear that the investigation was thorough and done in good faith, and that its conclusions were justified by the findings.

The Court's recognition that steps must be taken to protect the confidentiality of both the people and documents involved in the investigation has several other implications. An employer should have the ability to redact information that is not relevant or which is privileged. The employer should also always require a protective order limiting the use of documents before turning them over.

Additionally, the ability of employers to obtain the cooperation of witnesses in investigations could be more difficult, in light of the fact that all documents memorializing their statements may need to be turned over to the plaintiff and harasser. To protect themselves, however, employers may now need to inform witnesses that the materials might be supplied to others so that witnesses cannot claim later that the employer violated any promise of confidentiality. Additionally, an employer should consider whether it would be obligated to oppose disclosure on behalf of a witness as a result of either an employee relations concern or some legal duty.

Lastly, it is likely that the Payton Court's decision will have implications for other internal investigations, as well as the assertion of various privileges in other contexts, especially the attorney/client privilege, as previously noted.